No. 17-494

In The Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.,

Respondents.

On A Writ Of Certiorari To The Supreme Court Of South Dakota

AMICUS CURIAE BRIEF OF AMERICAN CATALOG MAILERS ASSOCIATION SUPPORTING RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 8

A. Catalog sellers continue to meet the needs of the traditional mail order customer while adapting to the internet 8

1. Payments by check present difficulties when complying with sales tax laws 8

2. Catalog retailers sell diverse types of products, serve differing customer needs, and operate in varying ways 8

B. Complying with sales tax collection requirements is hard 10

1. The proper evaluation of the taxable status of sales remains difficult because of the inherent complexity of the sales tax 10

2. Sales tax returns require frequent filings 14

3. Reporting errors are costly to sellers and consumers 14

4. Administrative costs are high especially for smaller sellers 16

C. The Commerce Clause prohibits the imposition of excessive burdens on interstate commerce 17

TABLE OF CONTENTS – Continued

Page

D. Applying principles of economic nexus destroys the concept of a safe harbor and pushes off all of the compliance burdens on interstate commerce 18

E. Protecting interstate commerce is not the role of the states 18

F. Catalog mailers have a legitimate concern that a reversal of *Quill* could be applied to prior transactions causing real hardships to these sellers 21

G. The *Quill* decision should not be limited to the use of mail and common carriers 23

H. The multiplicity of jurisdictions and their varying compliance requirements impose demonstrable burdens on catalog companies that are not addressed by the states 24

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES

Comptroller of the Treasury v. Wynne, 135 S. Ct. 1787 (2015) 17

National Bellas Hess, Inc. v. Department of Revenue of Illinois, 386 U.S. 753 (1967) ..... *passim*

Quill Corp. v. North Dakota, 504 U.S. 298 (1992) ..... *passim*

STATE CONSTITUTIONAL PROVISIONS

Ohio Constitution, Article II, Section 28 21

STATE STATUTES

Ohio Rev. Code § 5741.01(I)(1) 21

Ohio Rev. Code § 5741.16 22

Ohio Rev. Code § 5703.58 22

SDCL § 10-64-2 19

Wash. Rev. Code § 82.08.0532 19

OTHER AUTHORITIES

2017 MA H.B. 2 (NS) 14

Alabama Dep't of Revenue, *Alabama 2018 Back to School Sales Tax Holiday Participating Localities*, https://revenue.alabama.gov/sales-use/sales-tax-holidays/alabama-2018-back-to-school-sales-tax-holiday-participating-localities/ (last visited Mar. 31, 2018) 11

TABLE OF AUTHORITIES – Continued

Page

Am. Sub. H.B. No. 231, 142 Ohio Laws, Part II, 2635, 2918-2921 22

Interpretation Opinions, Streamlined Sales Tax Governing Board, Inc., http://www.streamlinedsalestax.org/index.php?page=alias-9 (last visited Mar. 30, 2018) 11

Mary Kay Martire et al., *Damned if You Collect, Damned if You Don't: Retailer Caught Between Consumer Class Action and Qui Tam Claims*, 24-OCT J. of Multistate Tax'n and Incentives 36 (2014) 15

Problem: A patchwork of complicated nonresident income tax laws, Mobile Workforce Coalition, http://www.mobileworkforcecoalition.org/problem (last visited Mar. 30, 2018) 19

United States Postal Service, *Still Relevant: A look at How Millennials Respond to Direct Mail* (2017), https://www.uspsdelivers.com/still-relevant-a-look-at-how-millennials-respond-to-direct-mail/ 2

United States Gov't Accountability Office, *SALES TAXES: States Could Gain from Expanded Authority, but Businesses Are Likely to Experience Compliance Costs* at 15-24 (Nov. 2017) 5, 16, 25, 26

INTEREST OF *AMICUS CURIAE*[1]

The American Catalog Mailers Association ("ACMA") is a nonprofit organization founded in 2007 to advocate for catalog marketers and their suppliers. ACMA is the leading trade association in the United States representing the interests of businesses, individuals, and organizations engaged in and supporting catalog marketing.

More than one-half of Americans shop using catalogs. More than 9,000 companies use catalogs to make sales, and many of these sellers are small and medium-sized entities. A requirement that sellers must file sales tax returns in every state in which they have customers would create barriers to entry and would place excessive burdens on those sellers engaged in interstate commerce.

Catalog sales remain a vital part of the economy. They represent the most universal source of goods, especially in rural areas, which are often far removed from stores and typically not wired for high-speed internet. Catalogs also attract customers concerned with online transactional safety because the catalog sellers generally provide both mail and phone ordering capabilities in addition to online ordering. Catalogs meet the needs of shut-ins, handicapped persons or older consumers. But, the use of catalogs is not limited to

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[1] This brief is filed pursuant to a blanket consent filed by all parties. No person other than *amicus* and its counsel has authored this brief in whole or in part or made a monetary contribution toward its preparation or submission.

older Americans. Baby boomers buy more from catalogs per capita than any other generation, and catalogs continue to be very relevant even among those comfortable with the digital age as studies show that millennials use catalogs when making purchases.[2]

Catalogs are particularly useful for presenting new products not yet known to consumers, and for providing better and more-detailed knowledge of certain types of products. But specialty retailers, which could not operate in storefronts because their products appeal to a small segment of the market, will struggle to comply with multiple taxing jurisdictions. Catalogs continue to serve the traditional markets, but are also used in combination with other means of selling products. Catalogs are also associated with the internet in a blend of old and new. In the real world of the small- and medium-sized catalog company, sales tax compliance remains a particular challenge that cannot be fixed by software.

The overwhelming burdens that compliance with the laws of multiple states and localities impose for smaller and medium-sized sellers are not adequately addressed by the Petitioner and its *amici* ("the states"). Just one example of how the states fail to depict the catalog market with accuracy is that the states assume that checks are no longer used in making sales, but that is untrue. Some catalog sellers continue to receive

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[2] See United States Postal Service, *Still Relevant: A look at How Millennials Respond to Direct Mail* (2017), https://www.uspsdelivers.com/still-relevant-a-look-at-how-millennials-respond-to-direct-mail/.

orders by mail accounting for as much as 35% of all of their sales, with many of these orders paid by check. The receipt of checks presents special challenges in complying with the tax rules of multiple jurisdictions as described below. But the states fail to acknowledge, much less confront, the many existing challenges like these facing catalog companies if the physical presence standard is abrogated.

SUMMARY OF ARGUMENT

The authority of the states and their many localities to tax interstate commerce is unquestioned. But the Commerce Clause prohibits actions that create excessive burdens impeding interstate commerce. As this Court said in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992): "the 'substantial-nexus' requirement is not, like due process' 'minimum-contacts' requirement, a proxy for notice, but rather a means for *limiting state burdens* on interstate commerce." 504 U.S. at 313 (emphasis added).

The states do not deny that burdens exist even today for retailers selling in interstate commerce. See Br. of Amici Curiae Multistate Tax Comm'n and Fed'n of Tax Admin'rs in Supp. of Pet'r at 9 ("For very small sellers these fixed costs [of collection and remittance] alone may be prohibitive."). The essence of the states' argument, however, is that the time has now come for interstate commerce to shoulder the burdens arising from the inherent complexity and uncertainty of the

sales tax collection process across multiple jurisdictions and that the states should be released from further efforts at tax simplification.

In particular, the states argue that the physical presence safe harbor – *i.e.*, the need for the seller to have some physical presence in the state constituting more than a slightest presence before the obligation to collect sales tax applies – should be rejected. The states propose three alternatives, none of which protects remote sellers:

1. Abandon any safe harbor altogether and permit collection responsibility whenever sellers have customers in the state and the remote sellers will simply have to deal with the burdens imposed on that collection responsibility;

2. Employ voluntary state-level sales volume standards, unique to each state, to protect sellers chosen for relief by each state; or

3. Abandon any national safe harbor and address any claims of burdens by remote sellers on a case-by-case basis in state-level judicial, administrative, or legislative proceedings, *i.e.*, let the states identify and deal with any burdens asserted by remote sellers.[3]

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[3] See Br. of Amici Curiae Multistate Tax Comm'n and Fed'n of Tax Admin'rs in Supp. of Pet'r at 17.

Tax systems by their nature are complex. The varied sales tax collection schemes applied by the states and localities would subject catalog companies to not only new and overwhelming collection burdens, but also additional liabilities for under-collection or to class action plaintiffs for over-collection. Good faith attempts at compliance are not enough in the face of tax audits or class action lawsuits. And, the administrative costs to comply with the ever-changing laws are real and substantial.[4]

The Streamlined Sales and Use Tax Agreement ("SSUTA") is relevant to the analysis because it reveals the inherent complexity in the sales tax collection process. Formed in 1999, SSUTA remains very much a work in progress. The Agreement (a) is applicable only to a third of the population of the United States[5] and (b) has not been adopted in any of the states that permit localities to administer a tax regime separately from the state. Of most concern, if *Quill* were overruled, member states of the SSUTA cannot be expected or required to continue to use the SSUTA

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[4] *Compare* Br. for Colorado and 40 Other States, Two United States Territories, and the District of Columbia as Amici Curiae Supporting Pet'r at 22 (contending retailers' "burdens of collecting have been all but eliminated") *with* United States Gov't Accountability Office, *SALES TAXES: States Could Gain from Expanded Authority, but Businesses Are Likely to Experience Compliance Costs* at 15-24 (Nov. 2017) (analyzing the costs and exposure for business in collecting taxes on all remote sales) ("GAO Report").

[5] See GAO Report at 18 (noting that twenty-four states have passed legislation to conform to the SSUTA and that many of the largest states in terms of population are not fully participating).

simplification efforts and non-participating states and localities cannot be expected to join the project, thereby exacerbating an already complex situation and ending any realistic hope of a uniform taxing standard.

Overruling *Quill* would not only discourage efforts at uniformity, but it would also expose catalog retailers to significant past lability for transactions that already have occurred. Contrary to the states' arguments, the states most likely would apply the expanded grant of authority to require sellers to pay sales tax for prior transactions. The states cannot commit to prospective application only. Current laws on the books of some of the states permit collection of taxes for prior transactions using standards beyond what *Quill* allows. Assessments based on these laws would not be applying the law retroactively because the state laws already exist. Moreover, state constitutional and statutory law will be cited by the states as preventing them from disregarding and not enforcing the state laws that predate the Court's decision in this appeal.

The argument advanced by the United States that the holdings in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967) and *Quill* should be confined to sales made solely by mail or common carrier[6] does not address sellers' concerns and should be rejected for two reasons. First, that rule would reflect the establishment of an artificial, non-economic

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[6] See Br. for the United States as Amicus Curiae Supporting Pet'r at Sec. B.

standard without any practical significance. Second, such a limited application of *Quill* evades, rather than confronts, the burdens placed on those selling in interstate commerce. Sellers using catalogs are a hybrid of the mail order companies of the past and sellers using the internet. The United States' argument would exacerbate, rather than alleviate, the burdens for catalog sellers.

In 2018, the complexity of the process of complying with sales (and use) taxes in the United States remains burdensome. In many ways, the nationwide sales tax system has actually become dramatically *more* complex. In comparison to the 2,300 local taxing jurisdictions at the time of *National Bellas Hess*, and the 6,000 taxing jurisdictions at the time of *Quill*, now more than 12,000 state and local jurisdictions exist in the United States that impose a sales or use tax. The classification issues between taxable and exempt sales and complying with extensive and changing procedural requirements remain serious problems for catalog retailers. Changing the law with respect to sales tax collection responsibility will add significant additional costs to be borne by sellers. Catalog sellers continue to need real simplification in the collection process and appropriate safe harbors.

ARGUMENT

A. Catalog sellers continue to meet the needs of the traditional mail order customer while adapting to the internet.

1. Payments by check present difficulties when complying with sales tax laws.

An important market remains for customers – principally older Americans – who use mail-in or telephone orders and make payment by check. On average, 9% of catalog purchases are made by mailed-in orders, and for some catalog sellers, mailed-in orders account for more than 35% of their sales. Many of these mailed-in orders include a check for payment. Payment by check thus continues to be a significant part of the catalog companies' business. The receipt of checks means that if the customer incorrectly determines the taxable or exempt status of the purchase or the applicable tax rate on the order form, the seller is confronted with a difficult task. When the customer underpays the tax, the seller must do one of the following: (a) return the check to the customer, (b) absorb the loss and pay the additional tax due directly, or (c) issue an additional bill for the balance due. Normally, the amount at issue ensures that it would not be economical to seek the underpayment from the customer so the seller picks up the tax. Cumulatively, the small underpayments become an economic burden on the sellers, especially for those with small profit margins. This problem is greatly magnified if *Quill* were to be overruled.

Whenever overpayments occur, the seller must either pay back the tax to the customer or overpay the state or localities. Under no circumstances can the seller keep that overpayment, including to offset underpayments from other customers: state laws prohibit retention of sales tax collected under any circumstances. For their part, consumers realistically cannot seek refunds for overpayments because of the time and difficulty of seeking refunds under state laws.

2. Catalog retailers sell diverse types of products, serve differing customer needs, and operate in varying ways.

Many different kinds of catalog companies sell to many different kinds of customers. A seller may target a small segment of the overall market, but across numerous jurisdictions. These specialty retailers need to reach the entire country and could not operate with storefronts. They provide specialized attention to customers, and the orders may change based on the back and forth discussion. As the goods and services become more specialized, the classification issues as to whether some or all of the products are taxable become even more difficult.

The suggestion that sellers are confined solely to mail or telephone orders on one hand or the use of the internet on the other does not reflect reality. Catalog companies' customers use both catalogs and websites. The common issue among the various marketing channels is that complexity and uncertainty affect all

sellers in interstate commerce making compliance difficult, risky, and expensive.

B. Complying with sales tax collection requirements is hard.

1. The proper evaluation of the taxable status of sales remains difficult because of the inherent complexity of the sales tax.

Sellers want to get the tax classifications correct. A state or local specific exemption may depend on the status of the customer – *e.g.*, whether engaged in manufacturing, or operating as one of certain statutorily defined types of charitable organizations. Other exemptions are dependent on the consumer's specific use of the item or service, such as using the item in certain types of manufacturing activities. These determinations remain challenging today, notwithstanding available software. The coding of dynamic retail inventories (*i.e.*, determining into what category the various products of the seller should be assigned for taxation) must reflect the many different and distinct Stock Keeping Units (SKUs) for products being sold. The coding process is a very judgment-intensive exercise that cannot be delegated to entry-level staff or third parties in that the process is replete with opportunities for honest errors creating unknown liabilities for future penalties and interest (in addition to uncollected tax). Sellers typically change their merchandise frequently; changing out one-third or one-half of the inventory every year is not uncommon. Different rules on shipping

costs, accounting for refunds and other administrative issues are consistent day-to-day problems.

Recently, more states have begun offering sales tax holidays providing temporary exemptions for items – *e.g.*, certain school supplies, some types of clothing or selected computers for one weekend a year. The classes of items that qualify for these exemptions differ from state to state, as do the calendar dates when the holidays occur. The compliance problems arising from the sales tax holidays are even greater for remote sellers with Alabama customers; each county or municipality decides individually whether to participate in the state tax holiday.[7]

The classification of taxable versus exempt sales is much more challenging than suggested by the states. Because of the number of definitions, exemptions, and procedural requirements for each state and many localities, compliance is necessarily difficult and uncertain. The SSUTA website shows the large number of complex tax classifications and procedures that have been considered over the more than 17 years of the existence of SSUTA.[8] While SSUTA continues to struggle with interpretive issues, at least for "streamlined"

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[7] Alabama Dep't of Revenue, *Alabama 2018 Back to School Sales Tax Holiday Participating Localities*, https://revenue.alabama.gov/sales-use/sales-tax-holidays/alabama-2018-back-to-school-sales-tax-holiday-participating-localities/ (last visited Mar. 31, 2018).

[8] See *Interpretation Opinions*, Streamlined Sales Tax Governing Board, Inc., http://www.streamlinedsalestax.org/index.php?page=alias-9 (last visited Mar. 30, 2018).

states, some guidance exists. For "non-streamlined" states and their localities, however, the lack of guidance and pronounced lack of consistency among state and even local interpretations makes compliance even more difficult.

The statutes and regulations of the states and localities frequently do not address the particular interpretative questions that retailers encounter day-to-day. Searching the sources of the law, even on the web, is time-consuming and information is presented in a variety of inconsistent formats. Getting the guidance that is needed is very difficult. The states are reducing the resources available to those seeking to obtain guidance on the state tax laws. If the seller's question is not addressed on the state or locality's website in a "frequently-asked questions" format and the seller cannot afford to pay for tax or legal advice, the seller must assume the risk of incorrectly classifying the item being sold as taxable or exempt. The localities typically provide even less guidance to sellers than that provided by the states.

Even if software is provided by the states, the cost of implementing the software in the first instance is a significant expense. Many catalog marketers rely on home-grown and specially-developed software to run their operations, warehouses, inventory management, order processing, customer service and other enterprise activities. Each time the state-provided software is updated, each of the sellers' legacy systems must be modified to map to (*i.e.*, identify the particular items being sold by reference to the categories defined by the

various states and localities) and interact with that software. Technology does not prevent the ongoing expense of implementing the software, coding inventories, updating the software, maintaining compliance, revising customer-facing communications, training personnel, answering customer questions, administering tax law changes, recordkeeping, and responding to audits by multiple jurisdictions. Software does not solve the problem, or avoid the printing expense, of communicating the complexities of a nationwide sales tax collection process to mail order purchasers as a part of the text of the catalog. The assignment of a tax rate to a zip code by the software, which itself has inherent problems, does not address the many other issues confronting sellers.

The internet does not solve these burdens. Catalog sellers using a web connection still must grapple with multiple state and local systems that remain both difficult and confusing for the taxability determinations and other elements of compliance. And, any claimed simplicities provided by the internet are irrelevant for customers who do not have online access.

Catalog sellers focusing on business-to-business ("B-to-B") sales make few, if any, taxable retail sales when the seller's product is inventory purchased for resale or other items that may not be taxable. Those sellers nevertheless must accumulate exemption certificates from all of their customers on a nationwide basis under the states' laws or face an assessment for the failure to collect. For these audits, the seller who has not collected and preserved all of the correct

exemption certificates is required to pay the tax to the state or locality even if the sale to the customer would be exempt. The number of certificates that must be obtained and preserved would increase greatly under the states' proposal. For example, South Dakota's sales thresholds are not confined to taxable sales, but include any sales, including exempt sales. The costs of compliance easily could exceed the total tax revenue the states would receive from these sales.

2. Sales tax returns require frequent filings.

Unlike a personal or corporate income tax, most sellers must file sales and use tax returns more frequently than annually. Some sellers file quarterly, but many sellers must file monthly returns for every state as well as for some localities. Some states even require estimated sales tax filings in between monthly filings. Massachusetts has proposed a daily sales tax collection system by third-party payment (credit card) processors. See 2017 MA H.B. 2 (NS), Secs. 49 and 60. Retailers, both large and small, using credit cards would have to track and reconcile all of these payments. The frequency of filings combined with the number of separate jurisdictions requiring separate reporting create a demonstrable undue burden.

3. Reporting errors are costly to sellers and consumers.

Because of the complexity and uncertainty inherent in the sales tax collection system, sellers are at risk

for good faith mistakes. If the seller fails to collect the tax initially, it normally is very difficult to ask the customer to pay the tax later. Nevertheless, the seller itself remains responsible for the tax, and penalty and interest likely will be added upon audit.

If the seller collects tax that should not be collected, it is difficult for sellers to claim the refund because the refund process requires extensive documentary support and adherence to rigorous procedural requirements. Moreover, the seller may be required to pre-pay the tax back to each customer before seeking the refund or obtain a written statement from each customer agreeing to await the resolution of the refund claim.

There is also an increasing danger of consumer class action cases when sellers are accused of over-collecting tax. See Mary Kay Martire et al., *Damned if You Collect, Damned if You Don't: Retailer Caught Between Consumer Class Action and Qui Tam Claims*, 24-OCT J. of Multistate Tax'n and Incentives 36 (2014). Depending on the theories advanced, the threatened recoveries could be multiples of the tax at issue.

Likewise, it is difficult for consumers to obtain refunds from the taxing authority when overpayments are made to sellers. Few consumers willingly undertake the process of seeking a refund. If the consumer simply deletes the tax from the payment of the invoiced amount, the seller could remain liable for the tax and likely will have already reported and paid over that tax to the taxing authority.

4. Administrative costs are high especially for smaller sellers.

Sellers are in the middle between the taxing authorities and the customer and the sellers want to get it right. Sellers cannot simply rely on the software vendors. The seller is the one that has to assign the taxability determination to the products and handle the administrative costs of registering, reporting, remitting and following up with customers and the taxing authorities.

The use of software requires considerable upfront costs conforming the software to the legacy computer systems in place for many catalog mailers. Sellers incur continuing costs to maintain and license the system and to update the classification of products to the changing tax laws. The November 2017 GAO Report addresses the costs of implementation and concludes that remote sellers will shoulder additional costs to become and remain compliant. See GAO Report 15-24.

Many of these burdens could be eliminated or reduced if the underlying complexity and uncertainty in the process were addressed before remote sellers with no in-state presence are compelled to undertake these additional expenses. If *Quill* is reversed, it is reasonable to expect that the states will proceed on their separate paths. The complexity and uncertainty will only increase.

C. The Commerce Clause prohibits the imposition of excessive burdens on interstate commerce.

The Commerce Clause protects interstate commerce by prohibiting excessive burdens being placed on commerce without congressional approval. Avoiding these burdens "strikes at one of the chief evils that led to the adoption of the Constitution, namely, state tariffs and other laws that burdened interstate commerce." *Comptroller of the Treasury v. Wynne*, 135 S. Ct. 1787, 1794 (2015). This Court has intervened in the absence of legislative action in recognition of the importance attached to preventing excessive burdens on interstate commerce.

Twice this Court – in *National Bellas Hess* and in *Quill* – has recognized that the systems by which states require remote sellers to collect state and local taxes burden interstate commerce. This Court applied a safe harbor of physical presence to limit the burdens. The states renew the same arguments made in the first two cases, arguing now that while the burdens may exist, those burdens can be overcome by software vendors and their products. The states do not deny that safe harbors should exist for remote sellers. Instead, the states argue that the establishment of the safe harbors should devolve to the states despite the constitutional mandate for Congress to establish the rules.

D. Applying principles of economic nexus destroys the concept of a safe harbor and pushes off all of the compliance burdens on interstate commerce.

The states argue that the physical presence safe harbor of *National Bellas Hess* and *Quill* should be replaced with the economic nexus standard, and that dollar or transaction volume thresholds could be established simply in the discretion of the states. But no dollar or transaction volume thresholds are guaranteed to any remote seller now or in the future. See Br. of Nat'l Governors Ass'n et al. Supporting Pet'r at 7-8 ("Determining the level of economic activity sufficient to create an economic nexus should be left to the state legislatures, as this determination is a *highly individualized and context-specific inquiry*.") (Emphasis added). By itself, the economic nexus standard imposes no restraint because the seller would be required to collect whenever the seller had a single customer in the state.

E. Protecting interstate commerce is not the role of the states.

The states propose to assume the role of addressing the burdens on interstate commerce either (a) by providing a dollar and transaction volume trigger for the obligation to collect tax, or (b) by providing safe harbors as a matter of state law on a case-by-case basis.

South Dakota, as a matter of state law, provides a trigger for the responsibility to collect based on either $100,000 in sales or 200 transactions annually in the current or previous year. SDCL § 10-64-2. Many sellers cannot know early in the year whether the cumulative sales in the year will exceed the threshold. Moreover, the trigger is solely a matter of state law. Other states have lower thresholds, including the State of Washington's trigger point of only $10,000. Wash. Rev. Code § 82.08.0532. The states specifically argue against a national standard, and instead seek differing state thresholds at levels determined by each state. Br. of Amici Curiae Multistate Tax Comm'n and Fed'n of Tax Admin'rs in Supp. of Pet'r at 26-27. The states thus would be free to set up the thresholds at any level, including upon the first sale into the state.

The states argue that individual states can be relied upon to establish reasonable standards *sua sponte*. Past practices do not support this assertion. One analogous situation is the application of income tax withholding to employees traveling in the states. While some states recognize the hardship on employers of withholding in multiple states and provide a safe harbor for employee travel in the state for 14, 20 or 60 days before requiring withholding of income tax by the employer, many states demand withholding the first time the employee enters the state.[9] Because nothing ensures that the states must apply a certain sales or

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[9] See *Problem: A patchwork of complicated nonresident income tax laws*, Mobile Workforce Coalition, http://www.mobileworkforcecoalition.org/problem (last visited Mar. 30, 2018).

transaction threshold for sales tax, it is unreasonable to expect the South Dakota levels to become the norm.

As an alternative to statutory dollar or volume thresholds, the Multistate Tax Commission and Federation of Tax Administrators argue for an assignment to the states of the authority to set nexus thresholds in the following terms:

> But we believe the physical presence standard not only represents what the *law* is, but acts as a substitute for a determination of what the *facts* are ("actual burdens"). If so, then the Court may simply remove the physical presence standard and allow the weighing of actual burdens, as a factual matter, to proceed in all cases. That weighing, of course, can occur not only in the courts, but through administrative and legislative processes. And to the extent those administrative and legislative processes arrive at a reasonable assessment of the relative burdens, and provide reasonable standards to avoid undue burdens, those standards can be applied as well.

Br. of Amici Curiae Multistate Tax Comm'n and Fed'n of Tax Admin'rs in Supp. of Pet'r at 17 (emphasis original). This proposal from the taxing authorities would be the ultimate devolution for standard-setting by allowing the state and local taxing authorities to evaluate and adjudicate specific burdens on interstate commerce for remote sellers in all cases.

F. Catalog mailers have a legitimate concern that a reversal of *Quill* could be applied to prior transactions causing real hardships to these sellers.

If the Court were to reverse *Quill*, the application of the new law to prior transactions would create real hardships for remote sellers. The sellers could not expect to recover the taxes from customers and would have to respond to audits for prior periods for which no state-specific tax information had been accumulated. This "lookback" would be occurring despite sellers' reasonable reliance on *Quill*.

Respondents have set forth compelling reasons why retroactivity remains a reasonable concern for all remote sellers. See Br. of Resp'ts at 62-65. In addition, the states could utilize a reversal of *Quill* to assess prior transaction while claiming no retroactive application of the state laws.

Ohio law shows how this could occur. The Ohio Constitution expressly forbids retroactive laws. Ohio Constitution, Article II, Section 28. Nevertheless, Ohio laws provide, and have provided for more than twenty years, that the collection responsibility under Ohio law for remote sellers is whatever the U.S. Constitution allows. Ohio Rev. Code § 5741.01(I)(1), in defining substantial nexus for determining which remote sellers must collect and report tax, states:

> "Substantial nexus with this state" means that the seller has sufficient contact with this state, in accordance with Section 8 of Article I

> of the Constitution of the United States, to allow the state to require the seller to collect and remit use tax on sales of tangible personal property or services made to consumers in this state.

Comparable language has been in the Ohio statute since 1987. See Am. Sub. H.B. No. 231, 142 Ohio Laws, Part II, 2635, 2918-2921. No statute of limitations would apply if the remote seller did not file in Ohio in prior years. Ohio Rev. Code § 5741.16. A separate seven-year limitation of the lookback would apply under Ohio Rev. Code § 5703.58. A seven-year lookback period for exposure to tax assessments would impose a significant burden on catalog companies of all sizes with Ohio customers.

Other states have different statutes that anticipated a possible change in the interpretation of *Quill* with different effective lookback periods. The states have been anticipating "Killing *Quill*" even before this Court addresses the issues. The states and localities likely will assert that their taxing authorities are bound legally to follow the laws as enacted by the legislatures effective with the respective dates of the enactments. As the Ohio analysis shows, a determination of how far back any new interpretation of the Commerce Clause would apply would require a careful analysis of prior enactments of the respective legislatures. The fact that South Dakota took retroactivity "off the table" provides no comfort to catalog companies with customers in other states.

G. The *Quill* decision should not be limited to the use of mail and common carriers.

The United States Government argues that "this Court should limit [*Quill*] to its precise holding, involving traditional mail-order retailers whose only connection to a state is by mail or common carrier." See Br. for the United States as Amicus Curiae Supporting Pet'r at 8. As the Government recognizes, this reading of *Quill* would render the decision meaningless, as it would recognize a safe harbor only for the *presumably rare* retailer. *Id.* at 32.

Creating a special rule under the Commerce Clause for sellers whose only connection to a state is by mail or common carrier would create a formalistic and unrealistic distinction between types of operations that does not reflect economic realities. Such a distinction does not serve the purpose of evaluating the burdens on interstate commerce.

Today, catalog companies use mail and common carriers, but also use websites. The burdens on retailers selling in multiple taxing jurisdictions without a local presence was the point of *National Bellas Hess* and *Quill*, and the different methods of reaching remote customers has not been shown to alter the analysis focusing on the burdens. This Court's physical presence safe harbor was not tailored to the method of operation but a reflection of the burdens facing the remote seller. Those burdens have survived the advent of websites and e-commerce. These real burdens continue

to support a physical presence safe harbor for remote sellers.

H. The multiplicity of jurisdictions and their varying compliance requirements impose demonstrable burdens on catalog companies that are not addressed by the states.

The burdens placed on remote sellers in complying with multiple state and local sales tax laws compel the conclusion that the states should be restricted when imposing sales tax responsibilities on remote sellers and that voluntary state restraints are insufficient. The states' relentless assault on the physical presence safe harbor over the last fifty years does not show that the *National Bellas Hess* rule was wrong. This Court correctly recognized that interstate commerce would be impermissibly burdened if the states were granted the unlimited ability to impose sales tax requirements on remote sellers. While the contours of the burdens may have changed, the burdens remain.

The states' unsubstantiated dismissal of the burdens facing remote sellers as insignificant also ignores the fact that small- and medium-sized catalog companies have particular legitimate concerns that are not being addressed by the states' proposals. The states point out that the tax is owed by the consumers. That is not in dispute, but the burden to collect and remit is not placed on the consumer, but instead is placed on the remote seller. Catalog companies do not object to reasonable burdens imposed for collecting sales tax.

The objection is limited to the imposition of the extra burdens created by the multiplicity, frequency and difficulty of remaining compliant, including registration, filing returns, and responding to audit notices – most of which are simply computer-generated and not the result of tax agent analysis – in a great many jurisdictions.

As Respondents point out, studies show that the larger retailers already collect the tax. Br. of Resp'ts at 4. The states' focus on the ability of the large retailers to comply is thus misplaced because the larger retailers already comply consistent with their business models. The more relevant burdens for this Court to consider are those facing small and medium retailers, and even "micro sellers." As the November 2017 GAO report shows, these companies, including many of the 9,000 catalog companies represented here, are least equipped to comply with the varying state and local requirements. See GAO Report 15-24. These retailers simply do not have the financial ability to pay for the compliance systems touted by the states as the solution to the sellers' burdens, especially considering the small margins on many of the products sold by the smaller retailers.

The states' attempt to address the burdens on smaller retailers by offering varying, voluntary, state-specific dollar and transaction thresholds also fails. For states with no or low dollar volume or transaction thresholds, the safe harbor will be useless. For those states with a dollar/volume threshold, staying compliant with these thresholds would add a separate level

of complexity for those retailers who might, based on customer response, sell above the threshold in any given year.

It is also no answer that retailers can avoid all uncertainty by collecting for every transaction because the cost of such compliance will prevent entry into the market for new retailers and doom some retailers already doing business: "[f]or very small sellers, these fixed costs [of collection and remittance] alone may be prohibitive." Brief of Amici Curiae Multistate Tax Comm'n and Fed'n of Tax Admin'rs in Supp. of Pet'r at 9. This observation is accurate, but does not go far enough in that more than the smallest retailers will be burdened.

The states recommend SSUTA to this Court as a model, but the actual SSUTA process does not support rejecting *Quill*. Rather, SSUTA and its 17-year history show that the process of collecting tax across many jurisdictions is hard, and that the process could be substantially improved by coordinated efforts by the states and their localities. As it stands now, SSUTA has been rejected by states representing almost 70% of the population and by every state that permits its localities to administer separate sales tax regimes. See GAO Report at 18. For SSUTA to present a solution or a model, more states would need to commit to the necessary reforms. On the other hand, reversing *Quill* now would eliminate any incentive for the states to continue to develop a streamlined sales tax system or to maintain the measures of the SSUTA.

South Dakota's appeal is a call to end the reform process, ignore the burdens, and proceed to require unrestricted collection responsibility subject only to voluntary limitations by the states under their own laws. The states and the localities should not obtain authority to require retailers to comply with the difficulties of collecting and remitting tax in multiple jurisdictions until the states address the burdens thereby created. SSUTA shows both the extent of the problem and a path forward. Until the burdens currently placed on remote sellers are addressed, the current safe harbor based on physical presence should be retained.

CONCLUSION

The decision of the South Dakota Supreme Court should be affirmed.

Respectfully submitted,

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